No. 22361

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOLLOWAY HOUSE PUBLISHING CO., a California corporation, Appellant, vs. WESLEY S. SHARP, individually, and as Chief of Police of the City of San Diego, and EDWARD T. BUTLER, individually, and as City Attorney for the City of San Diego, Respondents.	No. 22361 RESPONDENTS' BRIEF

On Appeal From the United States District Court
For the Southern District of California

BRIEF OF THE CITY OF SAN DIEGO

AS RESPONDENT

EDWARD T. BUTLER, City Attorney
KENNETH H. LOUNSBERY, Deputy City Attorney
BARBARA FLOOD, Legal Intern
City Administration Building
San Diego, California 92101

Attorneys for Respondent

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TABLE OF AUTHORITIES CITED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Appellant,	)	No. 22361
vs.	)	
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Respondents.	)	

STATEMENT OF THE CASE

On April 7, 1967, the Holloway House Publishing Company, appellant rein, filed this action in the United States District Court for the Southern District one, restrain the Chief of Police, his agents, and the City Attorney, the re- ondents herein, from interfering with the sale or distribution of material pub- hed by appellant called "The Complete Marquis de Sade" in the City of San ego and two, for a declaration that the said publication is not obscene. On Jan- ry 30, 1967, the respondents had arrested several retail bookstore owners who d sold the above-described publication, all of whom were customers of appel- nt, and criminal prosecutions were instituted in the state courts for violations the state obscenity law. [1]

California Penal Code
"Section 311. Definitions
As used in this chapter:
(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to purient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any other picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.
(d) 'Distribute' means to transfer possession of, whether with or without consideration.
(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c. 2147, p. 4427, §5.)"

California Penal Code Section

"311.2 Sending or bringing into state for sale or distribution; printing,

(continued on following page)

The arrests of January 30 resulted in three criminal cases involving a t of nine defendants. These cases are currently at various stages of litigation i California courts. The first case to come to trial resulted in an August 16, 1 conviction of the defendant by a Municipal Court jury, which conviction is now appeal before the San Diego Superior Court Appellate Department. In that app the appellant's opening brief has been filed, the respondent's brief must be fil by May 8, 1968, appellant's reply brief is due five days thereafter, and argun is set for May 17, 1968. The two remaining cases have been continued pendir outcome of the appeal; trial dates of June 10, 1968 and July 8, 1968 have beer

It must be stressed here that no threats of prosecution were ever made respondents to appellant or to any of appellant's customers, either prior to th arrests pursuant to the state Penal Code or at any subsequent time. No actic has been taken by respondents against appellant, and at no time have respondr

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1. (Continued from preceding page)
exhibiting, distributing or possessing within state
Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this S prepares, publishes, prints, exhibits, distributes, or offers to distribt or has in his possession with intent to distribute or to exhibit or offer t distribute, any obscene matter is guilty of a misdemeanor (Added Sta 1961, c. 2147, p. 4428, § 5.)"

2. Documentation of the state criminal proceedings is part of the record i case. Certified copies of the state criminal complaints were attached t and incorporated in respondents' Answer to appellant's Complaint. Exhi A and B attached to and incorporated in Defendants' Cross Motion for Sum mary Judgment in the District Court also indicated the parties and action the state court. The first case tried involved defendants Henderson and Hartman. The Municipal Court proceedings began on July 3, 1967 with preliminary motions, arguments and voir dire, the actual trial started on July 26, 1967, charges against Hartman were dismissed during trial and Henderson was convicted on August 16, 1967. Attorneys for appellant he in defended Henderson in the criminal trial.

ıed appellant with criminal prosecution by reason of the sale or continued
ion or distribution of "The Complete Marquis de Sade."

STATEMENT OF THE PROCEEDINGS BELOW

On April 7, 1967, this action was filed by appellant in the United States Dis-
urt for the Southern District of California. Motions for summary judg-
ere filed by both parties. On June 26, 1967, argument on the respective
was heard by the District Court judge. On July 20, 1967, the District
endered a memorandum order denying appellant's motion for summary
ıt and granting respondents' cross motion for summary judgment. On
4, 1967, an order was entered denying appellant's motion for summary
ıt, granting respondents' cross motion for summary judgment, and
g judgment in favor of respondents. This is an appeal from that judgment.

ARGUMENT

I

THE DOCTRINE OF ABSTENTION

Every federal court that is petitioned to grant injunctive relief where a
oceeding is pending must initially consider the possible application of
trine of Abstention. This doctrine, established in Railroad Commission
s v. Pullman Co. (1940) 312 U. S. 496 [85 L. Ed. 971] [61 S. Ct. 643] is
n two well-recognized rules. One, by awaiting state action the considera-
federal courts of constitutional questions may become unnecessary, and

two, state courts should be given the first opportunity to interpret state statute

The key case in which the doctrine is interpreted and applied is Douglas City of Jeannette (1942) 319 U.S. 157 [87 L. Ed. 1324] [63 S. Ct. 877]. In that case the United States Supreme Court ruled that a hearing wherein an injunctio is sought on substantive grounds may only be obtained after the plaintiff has ov come the initial burden of establishing a cause of action in equity.

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statut or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. (Citations omitted.) Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbite of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.'" (at pages 163-164.)

There are sound reasons for this initial scrutiny by the federal courts t determine the propriety of the proposed hearing. In Stefanelli v. Minard (19 342 U.S. 117 [96 L. Ed. 138] [72 S. Ct. 118] Justice Frankfurter delivered the ion of the Supreme Court and expressed what is generally regarded to be the most reason for the application of the Doctrine of Abstention. The applicatio this doctrine was even found to exceed in importance the compelling case brog under the Civil Rights Act.

> "(E)ven if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of

courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." (at page 120)

The unmistakable call of the above cases, and of the statutory law expressive principle of those cases, [3] is for the application of the Doctrine of Abstention even the factual circumstances that are evident in this case. Regardless of principle the appellant resists the application of the doctrine.

II

THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE DOCTRINE OF ABSTENTION

It is becoming more common for a defendant in state obscenity cases, or, this case, a party related to a defendant, to seek injunctive and declaratory in the federal courts. When seeking to enjoin the state proceedings and charged matter declared not obscene the moving party invariably asserts s action is not vulnerable to the application of the Doctrine of Abstention. rgument is made by appellant herein that such an action when sought under vil Rights Act pursuant to alleged deprivations of a constitutional right, rs the principle of abstention inapplicable. The cases indicate, of course, is is just not true.

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[3] "28 U.S.C. 2283 Stay of State Court Proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1958, c. 646, 62 Stat. 968."

A. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE DO-
TRINE OF ABSTENTION BECAUSE THE STATE COURTS HAVE PROVID
AND CONTINUE TO PROVIDE, AN AVAILABLE FORUM BEFORE WHIC
APPELLANT CAN PRESENT FOR RESOLUTION EVERY ISSUE OF FAC
AND LAW THAT HE SEEKS TO PRESENT BEFORE THE FEDERAL COU

In an obscenity case, as in any other case, the court must face the absten question. It has been held that the Doctrine of Abstention forecloses a hearing decision on the factual merits of the obscenity issue. Outdoor American Corp. v Philadelphia (1964 3rd Cir.) 333 F. 2d 963 rehearing denied, Certiorari denied 379 U.S. 903, and Dale Book Company v. Leary (1964) 233 F. Supp. 754.

In the Outdoor American case local retailers were arrested by Philadelpi authorities for selling obscene publications. The publisher who supplied the d- tributors and retailers with the allegedly obscene materials then sued under th Civil Rights Act in the District Court for a declaratory judgment and for injun relief. The publisher also joined as plaintiff one of the distributor/retailers i- volved in the criminal proceedings. Upon defendants' motion the District Cou dismissed the complaint on the ground that interference in state proceedings wa not justified. On appeal to the United States Supreme Court the dismissal was left undisturbed.

The Outdoor American case is a perfect example of the established princip of the Doctrine of Abstention being followed in an obscenity case. The federa courts never considered hearing the obscenity issue. The rule is succinctly sta by the court on appeal:

> "(1) Plaintiffs' prayer for a declaration the publications in question were not obscene is a circuitous way of requesting the district court 'to interfere with or embarrass' state proceedings. Whether the court should abstain from passing upon the merits of this litigation,

leaving that decision to the state courts, is the crucial question raised by the request for a declaratory judgment. No reason for the district court to involve itself with the basic question of obscenity at this time exists. The decision of the state courts may result in plaintiffs' obtaining the objectives they now seek. If not, petition to the Supreme Court of the United States for writ of certiorari remains. As Mr. Chief Justice Stone for the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 163, 63 S. Ct. 877, 881, 87 L Ed. 1324 (1943) stated:

> 'Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states--though they might otherwise be given--should be withheld if sought on slight or inconsequential grounds.' " (at page 965)

The application of the Outdoor American ruling was swift. The United District Court for the Eastern District of Pennsylvania relied on the prin- efined in Outdoor American when deciding Dale Book Company v. Leary. [4]

The facts in the Dale case were identical to those now before this A local dealer of nudist magazines was arrested by city authorities for obscene materials. The wholesale distributor, who did business with al retailer, thereafter brought an action against the city officials injunction under the Civil Rights Act to restrain prosecution dings. The court first exhausted the abstention issue which it felt lispositive, and then, out of an overabundance of caution, it discussed

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3 F. Supp. 754

the obscenity issue.

> "To this Court it appears that there is a further question: is this a matter in which a federal court should intervene at this stage in any event? This question, which is usually called the Doctrine of Abstention, in the opinion of this court, seems to foreclose, in any event, a decision on the merits of the publications." (at page 757)

The court's ruling on the abstention issue read as follows:

> "5. A federal court, in the exercise of its discretion, will not interfere in pending state proceedings on the assumption that a Pennsylvania statute will be interpreted unconsitutionally.
>
> "Accordingly, in the exercise of its discretion, this court will abstain from granting a preliminary injunction and granting other relief sought by the plaintiff in view of pending Pennslyvania criminal proceedings involving the subject matter of this suit." (at page 763)

The above cases clearly indicate that obscenity cases in which First Amendment issues are raised are in no way immune from the time-honored rationale of the Doctrine of Abstention.

The appellant states that the thrust of his complaint herein is directed against the censorship which appellees have invoked. (Appellant's Brief, page 16). Actually, there was no "censorship" of "The Complete Marquis de Sade" as the appellant has used this term. "Censorship," as it is used in this context, implies the use of threats of prosecution to keep the materials from being distributed. In this case, no threats of prosecution were ever made. Rather, there was good-faith prosecution of materials believed to be obscene under the standards by which obscenity is judged. The Defendants' Proposed Findings of Fact filed in Federal District Court stated the point exactly:

> "Neither the defendants nor any other officials or employees of The

City of San Diego have threatened, ordered, warned, or instructed plaintiff, or any news dealers selling plaintiff's materials, to refrain from selling Sade. At no time have the defendants threatened plaintiff with criminal prosecution by reason of the sale or continued production or distribution of Sade." (Proposed Finding of Fact #14)

Appellant cites the case of Zwickler v. Koota (1967) 389 U.S. 241 [88 S. Ct. [19 L Ed. 2d 444] to support his proposition that abstention is improper here. Zwickler case, however, is easily distinguishable on its facts from the case re this court. In Zwickler, a state statute made it a crime to distribute hand- in an election anonymously. An accused individual was convicted of violating statute, but obtained a reversal on state law grounds. After the state proceed- had completely terminated, and when threatened state prosecution under the e statute continued, the defendant instituted an action in the federal district t. The defendant sought declaratory and injunctive relief under the Civil ts Act based on the ground that the state statute was invalid on its face under First Amendment. At the time the federal court action was instituted, there no other forum in which the question was pending nor where a hearing could ad on the constitutional issue. These facts comprise the common thread to und woven throughout all those cases cited by appellant in his brief on pages nd 19. Given such facts the courts, not surprisingly, have found abstention e inappropriate. Where a party is given no opportunity to test a statute al- dly unconstitutional on its face, then the federal courts will provide the forum edress.

In the case at bar, however, there is a statute the constitutionality of which not been challenged and the terms of which are fairly subject to interpretation

in the state courts. In the very case relied upon by appellant, Zwickler v. Koot it is indicated that under those circumstances where a state court hearing would avoid or modify the constitutional issues sought to be presented before the feder court, the federal court should abstain. [5] This is the very essence of the case before this court. A convenient and available forum for the trial of the issues i this case has in fact already been provided. One of the cases in the state court progressed to such a point that the retrial of the same issues in the federal cou would constitute a useless act.

In an attempt to further substantiate his argument that abstention is not a- propriate in this case appellant cites and relies on Corsican Productions v. Pr (1964) 338 F. 2d 441. In that case, the appellants' complaint, seeking a restrai order and damages, was brought under the Civil Rights Act. The complaint al leged that appellants' movie, "Bachelor Tom Peeping", was not obscene and th appellees, deliberately intending to suppress the film, threatened exhibitors wh prosecution if they showed the film. Such a case is easily distinguished from he case at bar. The court, in fact, provided the distinction in its very holding by stating that in Corsican there were only threats of prosecution with the purpos of suppressing the film. Compare such threats to the good-faith prosecution i th present case. Not only has the forum for a resolution of the issues been avai- able to the appellant in this case, but he has taken advantage of that forum. Ap- pellant's attorneys have already spent four weeks in trial in the San Diego Mui- cipal Court presenting the same issues of fact and law that they propose to

5. Zwickler v. Koota, 389 U.S. 241 [19 L. Ed. 2d 44, at 450]

sent to the federal courts. Clearly, the principle of the Corsican case is plicable to the facts now before this court. [6]

The state proceedings, especially the pending appeal, provide the quickest sible final determination of the obscenity of "The Complete Marquis de Sade." material involved in the Municipal Court and Superior Court Appellate Dement proceedings is identical to that offered by appellant to the federal rts for a determination of the obscenity question. The same questions of fact law arise in both cases and the same attorneys are handling all cases. A ring on the substantive question of obscenity by this court would only result in usurpation or duplication of the prosecution of "The Complete Marquis de Sade" in progress in the state courts. There is no basis for believing that the state rts have been, or will be, unable to properly interpret and apply the laws of State of California. Appellant's request for a determination on the issue of enity constitutes a request of the federal courts to interfere with or embars the state proceedings. This court should not hesitate to concur in the denial uch a request.

Appellant argues on page 21 of his opening brief that the Doctrine of Absention as defined in the Douglas case has been held by this court in the Corsican case to be inapplicable "under the circumstances presented by the facts and pleadings". He tries to imply that the "facts and pleadings" referred to are those presented in this case. Such a statement is plainly wrong. The Corsican rule obviously applies to the facts and pleadings of that case alone and not to the case before this court which differs crucially from Corsican.

B. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE DOCTRINE OF ABSTENTION BECAUSE APPELLANT HAS NOT SHOWN DANGE OF IRREPARABLE INJURY BOTH CLEAR AND IMMINENT FOR WHICH HE HAS NO LEGAL REMEDY.

The argument has been made by the appellant that because a retailer is arrested for selling allegedly obscene material. the publisher of said material is thereby subjected to irreparable injury. that incident to the retailer's arrest he suffered damage. The argument has taken the following form; the retailer is afra to do further business with the publisher because of the alleged possibility of continued arrests. thereby causing the publisher some financial disadvantage. and th publisher has suffered injury to his business reputation by reason of the arrest. The courts have definitely not been impressed with the irreparable nature of such injuries as contemplated by the law.

Justice Stone pointed the way when he ruled in Douglas that an injunction would not be granted save in those circumstances where irreparable injury, which is both clear and imminent cannot otherwise be avoided. If irreparable injury cannot be shown, or it can be avoided by means other than injunctive relief. then the Doctrine of Abstention will be applied. This criterion has been applied in cases having facts identical to those before this court.

At page 21 of his brief appellant declares that respondents' reliance on the Outdoor American case is "obviously misplaced." He argues that the principle of the case is inapplicable here because one of the Outdoor American plaintiffs in

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7. Respondents emphasize that these assertions are nothing more than argument. No evidence to indicate the genuineness of the statements has been offered. References by appellant at page 5 of appellant's opening brief are to unproved allegations in appellant's complaint.

the federal action for injunctive and declaratory relief was also a defendant retailer in the state criminal prosecutions. Appellant argues that in this case, because the defendants in the criminal action are not parties to the federal suit, a resolution of the state actions will not afford the appellant the relief he seeks. Appellant's argument is specious.

As in the case before this court, the publisher in the Outdoor American case who was the plaintiff in the federal suit seeking declaratory and injunctive relief, was in no way involved in the state criminal proceedings. One of the several retailers who had been arrested for selling allegedly obscene materials, which materials were supplied by the plaintiff, was also a party plaintiff in the federal suit. At the District Court and Court of Appeals levels the publisher argued that any resolution of the state criminal proceedings involving the retailer would offer no protection for him. This is the identical argument posed by appellant herein. Just as in the Outdoor American case, the appellant herein alleges irreparable damage caused by the state action and the lack of an available forum for the redress of his injuries. The court in the Outdoor American case handled this argument as follows:

> "Danger of irreparable injury both 'clear and imminent' has not been shown. Since there are three plaintiffs in the matter before the federal court and only one involved in state proceedings, it is argued a finding of not guilty in the state courts of one of the plaintiffs is no protection to the others. The fact only one plaintiff is being prosecuted in the state courts is without independent legal significance, since publications involved are the same as to each plaintiff. All issues plaintiffs are raising in the federal court may be brought before the state courts, and there is no reason to believe state officials will enforce the Pennsylvania statute against plaintiffs not involved in state proceedings if the publications are found not obscene in the pending criminal prosecution. If held obscene,

> plaintiffs not involved in state proceedings cannot complain of enforcement of the statutes. Nor should a federal court of equity ambush the state courts by deciding the fundamental basis of obscenity." (at page 965)

So, merely because the plaintiff may not be a party defendant in the pending state action does not mean that he is injured irreparably and is without an adequate remedy.

The application of the irreparable injury principle set forth in the Outdoor American case can again be witnessed in Dale Book Co. v. Leary.[8] Where a newsdealer was arrested for distributing obscene materials, the distributor sued in the federal court to enjoin the state action. The facts and the claims made by the plaintiff were, once again, identical to those presented to this court.

> "There was no evidence of prior threats, warnings or other orders relative to these arrests and seizures. Indeed, the testimony was entirely to the contrary as to the assertion of prior restraint, (citations omitted) as appears in the specific finding which follows:
>
> "No officer of plaintiff was arrested for possessing or disseminating the nudist publications for which it is the distributor in this area. No nudist publications were seized from plaintiff. Indeed, no official action has ever been directed against plaintiff to prevent distribution of nudist publications. The arrest of Dale customers, the newsdealers mentioned above, have indirectly affected Dale in two ways. First, the dealers in Philadelphia are apparently afraid to buy Dale publications for fear of being arrested for violation of the Pennsylvania Obscenity Statute. Secondly, Dale is obligated by trade custom and practice to give the arrested dealers a credit for those magazines distributed by Dale which were seized on the three occasions already described." (at page 756)

When faced with these facts the court found, at page 763, that "Inconvenience and possible financial loss is no ground for federal intervention, in the absence of a showing of irreparable injury not compensable in money damages."

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8. 233 F. Supp. 754

The facts in the case here reveal that the appellant has not been injured, or threatened with injury, other than that incidental to the enforcement of state law. It would be a truly intolerable situation if, whenever an individual is charged with a criminal offense anyone having a business relationship with that individual could contest the charge in an original proceeding in a federal court. As an incident to nearly every lawful arrest, a defendant or someone related to the defendant suffers some consequential financial injury. Because the law does not contemplate or sanction the hearing of such cases the rule has evolved that injuries suffered as the result of a lawful arrest are not irreparable and do not enable a party injunctive relief in a federal court.

III

THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE DOCTRINE OF ABSTENTION BECAUSE THE SUBSTANCE OF APPELLANT'S SUIT FOR DECLARATORY AND INJUNCTIVE RELIEF CONSTITUTES A REQUEST OF THE FEDERAL COURTS TO STAY OR IMPEDE STATE PROCEEDINGS.

It is never set forth in appellant's pleadings that he seeks to actually enjoin the pending state proceedings. He declares that he has been "threatened" with irreparable injury by the "conduct" of respondents, which "conduct" he seeks to have terminated by this court. The only "conduct" of the respondents which indirectly affected appellant has been the arrest, prosecution, and conviction of local booksellers. There cannot be one shred of doubt that it is this process that appellant wishes to impede.

The law requires that the court, when considering injunctive relief, contemplate the actual impact of its ruling rather than its mere form. Sperry Rand

Corp. v. Rothlein (1961) 288 F. 2d 245. Even where a plaintiff does not ask for an injunction to stay or impair state proceedings, where it is apparent that this, in effect, is his object, his request will be denied. McGuire v. Amrein, 101 F. Supp. 414. Nor is the prohibition regarding the enjoining of state proceedings avoided by framing an injunction as a restraint on a party litigant rather than directly against the state court itself. H. J. Heinz Co. v. Owens, 189 F.2d 505 [342 U.S. 905] [96 L. Ed. 677]; Chaffee v. Johnson (1964) 229 F. Supp. 445, affirm 352 F.2d 514, certiorari denied 384 U.S. 956. While not so stated specifically, appellant seeks to enjoin state proceedings. That could be the only possible explanation for this action. The thinly-veiled attempt at a restraint upon the state court was recognized by the District Court for what it was and the attempt was repulsed. Respondents respectfully submit that this court should affirm this conclusion.

IV

THE DISTRICT COURT DID NOT ERR IN NOT HEARING THE OBSCENITY ISSUE AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE SUBSTANTIVE QUESTION OF OBSCENITY WAS NOT BEFORE THE COURT.

The decision of the District Court to grant respondents' Motion for Summar Judgment necessarily precluded a hearing on the question of obscenity. Respondents grounded their motion on the application of the Doctrine of Abstention. The granting of said motion forestalled the presentation of the substantive issue entirely.

The court had no evidence before it to provide a basis for deciding the obscenity issue. The unproved allegations contained in appellant's pleadings provided

the court with nothing upon which judgment could be based.

Respondents have never asserted, and do not assert here, that triable issues of fact do not exist in the process of determining the obscenity of "The Complete Marquis de Sade." Where a party asserts, as appellant does here, that charged matter has some redeeming social importance by virtue of its being the entire antiquated work of a writer who has illuminated the extremes of human thought and conduct, there could not exist a more basic question of fact than the genuineness of that assertion. The question of whether or not "The Complete Marquis de Sade" is utterly without redeeming social importance cannot be determined without a full hearing designed to disclose facts bearing on this point.

It is the respondents' position that those factual issues should be tried, as they indeed have been in one case, in the state courts. In the event that this court disagrees with the application of the Doctrine of Abstention respondents submit that its only choice would be to remand the cause to the District Court for trial.

CONCLUSION

From the above review of the facts and the law the merit of respondents' position is clear. The District Court did not err by applying the Doctrine of Abstention and granting respondents' Motion for Summary Judgment. It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWARD T. BUTLER, City Attorney

By /s/ KENNETH H. LOUNSBERY, Depu

Attorneys for Respondent.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with tho Rules.

/s/ KENNETH H. LOUNSBERY, Deputy